BEFORE THE POLLUTION CONTROL HEARINGS BOARD
FOR THE STATE OF WASHINGTON

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| CATHERINE BRYANT, KENT W. SARGEANT, ROBERT P. SHEEHAN, and ESTHER R. SHEEHAN,<br><br>Appellants,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, RONALD SHER AND WALLY GUDGELL,<br><br>Respondents. | PCHB No. 87-245<br><br>FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

This matter, the appeal on Order (No. De 87-N265) approving a permit to withdraw domestic water from a well on Orcas Island, came on for hearing before the Pollution Control Hearings Board, Wick Dufford, Chairman, presiding, on May 10, 1988, in Mount Vernon, Washington. Board member Judith A. Bendor has reviewed the record.

Appellant Bryant represented herself. Intervener appellants Sargeant and Sheehan did not appear. Respondent Department of Ecology was represented by Peter R. Anderson, Assistant Attorney General. Wally Gudgell represented himself and his co-applicant Sher.

Witnesses were sworn and testified. Exhibits were examined. From the testimony heard and exhibits examined, the Board makes these

FINDINGS OF FACT

I

Years ago, perhaps as early as 1936, a hand dug well was constructed as a source for domestic water at a location 675 feet south and 638 feet west from the northeast corner of Section 21, within Government Lot 1, Section 21, Township 36 North, Range 2 West, Willamette Meridian. The site is on Orcas Island, a short distance north and west of the Orcas ferry landing.

On March 15, 1970, William C. Bryant, the owner of the property where the well is located filed a Water Right Claim with reference to this domestic well.

II

Bryant's property included a tract, some distance from the well site, lying slightly to the east of the ferry landing, within the NW 1/4, Sec. 22, T. 36 N., R. 2 W., W. M. This parcel has been served with domestic water from the well since at least 1970, when the original dug well was replaced with a deeper drilled well.

In June, 1977, Magnus P. Berglund purchased the tract east of the ferry landing, in an agreement which included rights to water from the well. The parcel contains a white cottage dating from the 1930s, a shop building built in the 1950s, and an A-frame constructed in the early 1970s, all of which are presently served by pipeline from the well.

The site of the well is still retained in the Bryant family.

III

On March 14, 1980, Berglund applied to the Department of Ecology for a ground water appropriation permit authorizing the domestic supply from the well for the structures on the property he had acquired.

In late 1981 or early 1982, Berglund sold to Ronald Sher and Wallace Gudgell and, thereafter, assigned to them his interest in the ground water application. At around the same time, an action was prosecuted in San Juan County Superior Court to quiet title to the interest in the well water which had been conveyed to Berglund when he purchased.

The Superior Court, in Cause No. 3920, quieted title in plaintiff's Sher and Gudgell to a three-quarters interest in the well, stating:

> Said plaintiffs ... have the right to withdraw three-quarters of the water from said well together with the right to go upon the property of defendants Bryant for the purpose of maintaining said well, and related necessary improvements including the water lines between said well and the property of plaintiffs described on the contract.

IV

On October 26, 1987, Ecology issued Order No. DE 87-N265 by which it approved the issuance of a ground water permit to Sher and Gudgell to withdraw water from the well at a rate of three gallons per minute, limited to 1.25 acre feet per year for continuous domestic supply for

the two single family residences and a shop.

The Report of Examination accompanying the Order referred to the San Juan County Superior judgment and stated:

> It is understood that the court-ordered decree determines the actual quantity of water applicants can withdraw from the Bryant well. The maximum quantities of 3 gpm and 1.25 acre-feet per year are thus maximum quantities only, recognizing that often--especially during the drier seasons--a much lower rate may be necessary to prevent seawater intrusion and commensurate with declining water supplies.

The report of Examination did not specify any date for the permittees to submit proof of appropriation.

V

Catherine Bryant is the daughter of William C. Bryant and the successor to the Bryant holdings. During the course of Ecology's processing of the Sher and Gudgell application, she protested the issuance of a permit, expressing objections to the rate of withdrawal and a fear of seawater intrusion into her well.

On November 5, 1987, Ms. Bryant appealed Ecology's approval of the Sher/Gudgell permit to this Board. Kent Sargeant and Robert P. Sheehan and Ester R. Sheehan later intervened in opposition to the permit but took no part in the case beyond filing letters of position.

VI

The well penetrates unconsolidated deposits which overlie a bowl

of bedrock in the immediate area. These deposits are recharged by precipitation and by run off from all directions. The well is believed to be 126 feet deep.

Measurements taken in 1982 and 1988 show that the static water level has remained between 28 and 29 feet below ground surface. Fluctuations in production of this and other wells in the area likely reflect seasonal ground water table fluctuations. Notwithstanding drought conditions in recent years, there is no evidence of a long-term decline in the water table.

Moreover, there is no evidence that normal operation of the system serving the Sher/Gudgell property causes well interference, adversely affecting other ground water systems in the vicinity.

VII

The well in question is located about 400 feet east of the seawater in West Sound at a ground surface elevation of about 35 feet above sea level. The bottom of the well is, thus, thought to be about 91 feet below mean sea level.

There is no evidence of high chloride counts from wells in this area of Orcas Island. Over the many years of its operation, the well serving the Sher/Gudgell property has developed no indications of sea water intrusion.

VIII

Standard quantity allocations for domestic service used by

Ecology encompass a range between .25 and 1.0 acre foot per service. Here the 1.25 acre feet assigned is well within the range, being calculated at an annual allowance of .5 acre foot per house and .25 acre foot for the shop.

A withdrawal rate of 3 gpm, however, even if utilized all day every day, would not produce enough water yearly to reach the 1.25 acre foot allocation. Indeed, a well pumped continuously for 24 hours at 3 gpm would yield less than 5,000 gallons, which is the amount per day for domestic use which the legislature has provided is exempt from the ground water permit requirement. RCW 90.44.050.

All this underscores that the 3 gpm at issue is a very modest aggregate withdrawal rate for the three services contemplated. Nevertheless, the 3 gpm rate does not represent a constant demand on the system. The uses will not require withdrawals on a 24 hour a day basis. Faucets will be turned on only sporadically. The actual quantities used will be far less than what the continuous instantaneous withdrawal of 3 gpm would yield.

IX

Ms. Bryant testified that the present system has always provided only a minimal water supply. She said that over the last 10 years, the production of the well has been getting worse.

A pump test conducted in March, 1980, showed that the well presently can yield .6 gpm at equilibrium with a draw down of around

12 feet. Recovery of the static level after pumping is rapid.

X

When the Report of Examination was written in October, 1987, Ecology's inspector believed that the well was capable of yielding 4 gpm. The 3 gpm allowed to Sher and Gudgell was intend to represent their 3/4 interest in the well's production under the Superior Court decree.

However, the permitted appropriation can only be perfected at the rates actually achieved in operation. If over time the well yields no more than .6 gpm, then the appropriation of Sher and Gudgell will be limited to what can be produced, taking into account the need to insure that the 1/4 interest retained by Catherine Bryant is never impaired.

XI

Objections to the permit appear to be based on the idea that Sher and Gudgell are being granted an enlargement of their present use. We find no evidence of an intention to enlarge the use and we are convinced that Ecology has attempted only to authorize the historic level of use, as conditioned by the Superior Court decree.

If the numerical values assigned by the agency exceed what the well will yield, Sher and Gudgell cannot acquire certificated rights equal to these values. Their appropriation will be limited by the physical realities.

XII

Between the Sher and Gudgell parcel and the well on Bryant's property are intervening ownerships. Sher and Gudgell must acquire easements or other appropriate permission to transport the water over this intervening land. Failure to do so could prevent them from exercising any rights they might otherwise acquire under their appropriation permit.

The permit at issue is the state's permission to take water from a certain point and to use it for a stated purpose at another point. Questions of how to get the water from one place to the other must be resolved between the private property owners concerned, and are not issues before this Board.

XIII

This record contains no evidence that use of the well in question for domestic purposes has in the past been harmful to human health. There is no evidence of any present restriction on its use for such purposes by public health authorities.

XIV

The Orcas Village neighborhood around the ferry landing is, in the main, provided with water by a water users association which takes water from several wells in the near vicinity of the well at issue here. In recent years, this community system has suffered chronic water shortages. Increased demand on this community system will, of

course, exacerbate the problems unless additional sources are found.

However, the long-standing use of the well at issue does not represent an increased demand on the aquifer. There is no evidence that use of this well is the source of the community system's problems or that its continued use will make a difference in this regard.

XV

Sher and Gudgell do not live on the parcel involved here. The two dwellings and the shop are used as rental units. Since taking over these units, Sher and Gudgell have established an unenviable record of neglect in the operation, maintenance, and upkeep of the system. They have failed to insure that leaks are detected and timely stopped, that breakdowns are quickly remedied, that the well equipment and appurtenant transmission lines are adequately inspected and maintained in good working order.

XVI

We find that water is available from the well to serve the three identified domestic uses on the Sher/Gudgell property and that such uses are beneficial uses.

XVII

We find that appropriation of water for domestic purposes within the rate and quantity set or within the capacity of the well--whichever is less--will not impair existing rights, so long as the court decree is not violated.

XVIII

We find that use of the well as authorized, will not be detrimental to the public interest in insuring that adequate supplies of potable water are available for domestic use, so long as the system is properly operated and maintained by the permittees. To insure that the public interest is served by this development, the permit should be conditioned as follows:

1) The permittees shall maintain the domestic water system authorized in good operation and repair.

2) The permittees shall establish a program of routine inspection and maintenance of the system which shall be approved by the Department of Ecology.

3) If the approved inspection and maintenance program is not followed or if failures occur to the system which are not immediately remedied, the Department may rescind this permit or otherwise take steps to enforce the good operation and repair requirement.

XIX

We find that use of the well, as authorized, will probably not result in sea water intrusion, but that there is a risk of such intrusion if the limited aquifer is overstressed. The public interest necessitates that the permit be conditioned explicitly to insure that sea water intrusion is not allowed to occur. The permit will be in accord with the public interest if it contains the following conditions:

1) The permittes shall sample the water in the well at least every six months and cause these samples to be analyzed for chlorides. The results of each

sampling will be filed with the Department of Ecology with a copy sent to Catherine Bryant or her successor in interest.

2) If chloride counts increase to a point indicative of the onset of sea water intrusion, the permittees shall adjust the pump intake level to be above mean sea level or make appropriate reductions in pumping rate as required by the Department of Ecology.

3) If the above measures do not arrest the problem, the permittees shall, upon notification by the Department of Ecology, cease all further withdrawls.

XX

There is evidence of the existance of other wells with more satisfactory and reliable water yields which could be used to furnish the Sher/Gudgell property.

XXI

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these parties and these matters. Chapters 43.21B RCW and 90.44 RCW.

II

The ground water code incorporates the provisions of the surface water code relative to the processing of applications for permits to appropriate. RCW 90.44.060.

Under RCW 90.03.290 the Ecology department has a duty "to investigate all facts relevant and material to the application" and to determine 1) whether water is available, 2) whether the proposed use is beneficial, 3) whether existing rights will be impaired, and 4) whether the appropriation will be detrimental to the public interest. Stempel v. Department of Water Resources, 82 Wn.2d 109, 508 P.2d 166 (1973).

III

The "public interest" criterion of RCW 90.03.290 is, to some degree, fleshed out by the declaration of water management fundamentals in RCW 90.54.020. Among the policies there stated is a prohibition, in general, against water allocations which will result in degraded water quality. Another of the policies speaks to preserving and protecting adequate and safe supplies of water in potable condition to satisfy human domestic needs.

IV

Given our Findings, we conclude that Ecology's Order approving the permit to Sher and Gudgell was correct under the criteria of RCW 90.03.290, as supplemented by RCW 90.54.020, if:

1) The conditions specified in Findings of Fact XVIII and XIX are included in the permit when issued.

2) A date for proof of appropriation is established, so that the actual rate and quantity of use by the system can be reflected on the Certificate of Right.

V

In light of the marginal reliability of the supply from the well in question and the burden of system maintenance and repairs, permittees may wish to look to other sources of water for the property concerned. If the system authorized by the permit is abandoned, or if proof of appropriation is not made within the time specified, the permit may be cancelled. RCW 90.03.320; RCW 90.14.180.

VI

Ms. Bryant is under no obligation with regard to the proper operation of the Sher/Gudgell system. She does, however, have sufficient interest in the production of the well to insure that water withdrawn from it is not wasted contrary to the policy of RCW 90.03.005 and RCW 90.03.400.

VII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The approval by the Department of Ecology of Ground Water Permit Application No. G1-23591 is affirmed, provided that the permit issued in response thereto complies with Conclusions of Law IV above.

DONE this 6th day of December, 1988.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

JUDITH A. BENDOR, Member

BEFORE THE POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

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|---|---|
| IN THE MATTER OF ELLENSBURG CEMENT PRODUCTS,<br><br>Appellant,<br><br>v.<br><br>STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,<br><br>Respondent. | PCHB Nos. 87-250 & 88-89<br><br>FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER |

THIS MATTER, the appeal from Department of Ecology Notice and Order No. DE 87-C411, and appeal from Department of Ecology Notice of Penalty Incurred and Due No. DE 87-C412 in the amount of $3,000, came on for hearing before the Pollution Control Hearings Board, Wick Dufford, Presiding, and Hal Zimmerman, at a formal hearing in Ellensburg, Washington, on July 14, 1988.

Appellant appeared by his attorney John P. Gilreath. Respondent appeared by Jeffrey S. Myers, Assistant Attorney General.

Court reporter Pamela J. Brophy of Gene Barker & Associates, Olympia, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and examined, the Board makes these

FINDINGS OF FACT

I

Appellant Ellensburg Cement Products, Inc. owns and operates a cement batch plant located alongside Mercer Creek near Wenas Street and 7th and Highway 12 in Ellensburg.

II

Respondent Department of Ecology (DOE) is a state agency charged with administration and enforcement of the State's Water Pollution Control Law, Chapter 90.48 RCW.

III

On October 8, 1987, Ecology inspectors Harold Porath and John Hodgson visited the batch plant. The inspectors observed a cement truck being washed on a cement pad approximately 50 yards from Mercer Creek. The wash water collected into a drain on the pad and flowed through an underground pipe to the adjacent creek. At this point the wash water, which contained cement, discharged into Mercer Creek creating a turbid grey-colored plume.

IV

Upstream of the discharge pipe, the creek water was clear. The inspectors observed the plume flowing downstream for approximately 45 yards, where it flowed into a culvert crossing a local road. The stream remained cloudy for as far as they could see.

The Board takes notice of the fact that the addition of five nephelometric turbidity units (NTU) to clear water is difficult to discern with the naked eye. Here the turbidity plume was distinct, obvious, easily visable. The clear appearance of the water upstream is indicative of background turbidity well below 50 NTU. Under the circumstances, the observance of a marked, discernible turbidity plume demonstrates a change of greater than five NTU over background.

V

The inspectors observed a significant quantity of dried cement on the banks of Mercer Creek. They saw piles of concrete where cement had been disposed of. The inspectors took photographs of what they observed at the creek and grounds.

After making their observations, the inspectors met with James Hutchinson, president of Ellensburg Cement Products, at the batch plant offices. Hutchinson admitted that the discharge to the creek was from the company's truck washing operations. He confirmed that the drain and discharge pipe arrangement had been in place for a considerable time. After brief discussion, he agreed that the discharge would be eliminated.

VI

Mercer Creek is a natural watercourse which rises in the Colockum Hills and flows into the valley through Ellensburg. On part of its journey through the city it is undergrounded. At the batch plant site it is an uncovered, open, free-flowing stream, varying between 8 and 15 feet wide and from 6 inches to 1 1/2 feet deep. Below the site it joins Wilson Creek, a natural stream which receives irrigation return flows. Ultimately (four to five miles below the batch plant), the combined creeks flow into the Yakima River.

At the time of Ecology's inspection, Ellensburg Cement Products

had no waste discharge permit for discharges to Mercer Creek from its batch plant site, nor had it applied for one.

VII

On October 23, 1987, Ecology issued two orders to Ellensburg Cement Products. The first, Order No. DE 87-C411, was a regulatory directive, reciting the observations of October 8, 1987, and specifying corrective actions to be taken. The order called for an immediate cessation of wash water discharges to the creek and for retaining a professional engineer within 15 days of receiving the order to prepare plans and specifications for control, prevention or elimination of waste water discharges. The plans and specifications were to be submitted to Ecology in 60 days, with construction to follow Ecology's approval on a schedule to be established.

The second order, Order No. DE 87-C412, was a notice of civil penalty, based on a recitation of the inspector's observations identical to that contained in the first order. The penalty assessed was $3,000.

VIII

Ellensburg Cement Products attempted to effect an interim correction of its disposal practices. In late October, 1987, an 8 to 10 foot deep unlined pit was dug and washwater discharges were rerouted to this pit where they co-mingled with the ground water. The pit was inspected by Harold Porath on October 29, 1987, but, in his

view, it fell far short of fulfilling the requirements of Ecology's regulatory directive.

IX

On November 9, 1987, the Pollution Control Hearings Board received an appeal from Ellensburg Cement Products of Ecology's regulatory directive (Order No. DE 87-C411). Concurrently with this appeal, the company filed a request with Ecology to exercise its discretion and reduce or eliminate the monetary penalty.

On November 24, 1987, after Ecology notified the company of its refusal to alter the penalty, Ellensburg Cement Products sent a notice of appeal of the penalty to both Ecology and the Board. Ecology received its copy of the appeal on November 30, 1987. The Board did not receive its copy.

Months later, after being informed that the Board had not received the appeal of the penalty, Ellensburg Cement Products filed another copy thereof with the Board. The two cases, PCHB Nos. 87-250 (regulatory directive) and PCHB 88-89 (penalty), relating to the same underlying facts, were then consolidated for hearing by the Board.

X

On March 11, 1988, Ellensburg Cement Products sent a draft engineering report to Ecology. This report was finalized April 8, 1988, and approved on April 13. On June 8, 1988, Ellensburg Cement Products notified DOE that the engineered facilities had been

constructed. On June 27, 1988, Ecology issued an order (Order No. DE 88-369) acknowledging that the deficiencies identified in the regulatory directive had been corrected.

XI

On two earlier occasions, one in 1976 and the other in 1985, the company was cited by Ecology for discharging turbid water. These incidents arose from gravel mining operations at sites other than the Ellensburg batch plant. In each case, penalties were assessed by Ecology ($500 and $1,000 respectively) and paid by the company.

XII

Any Conclusion of Law which is deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these matters and these parties. Chapter 90.48 RCW, Chapter 43.21B RCW.

II

RCW 43.21E.300 and 310 provide for the appeal to the Board of penalties and orders issued by Ecology. Appeals must be filed within 30 days after receipt of the penalty or order.

Prior to the hearing, Ecology moved to dismiss the civil penalty appeal on the grounds that it was not timely filed with the Board.

After briefing and argument, the Board denied the motion.

The regulatory directive issued in this case is an order issued pursuant to RCW 90.48.120(2), appealable to the Board by the express terms to RCW 43.21B.310(1). That the appeal of this directive was properly and timely made to the Board is not contested.

Once the regulatory directive was appealed, the Board acquired jurisdiction and the underlying facts were placed at issue. Thereafter, the function of pleadings, as to the events, was simply for notice purposes. The notice function is adequately performed if parties are advised of the issues sufficiently in advance of hearing that undue surprise and prejudice do not result. Marysville v. PSAPCA, 104 Wn.2d 115, 119, 702 P.2d 469 (1985).

Here Ecolgoy was timely advised of the civil penalty appeal. When this appeal was received, Ecology had already been informed of a challenge to the facts giving rise to its regulatory actions. Under the circumstances, we do not view the problems with the mails in lodging the second appeal document with the Board as fatal. We interpret the civil penalty appeal as a proper amendment to the pleadings previously made regarding the regulatory directive. No suprise or prejudice was shown. See R. V. Associates v. PSAPCA, PCHB No. 88-28 (Order on Motion to Dismiss, July 13, 1988).

III

Ecology also moved to dismiss the appeal of the regulatory

directive on the grounds that because the alleged deficiences had been corrected prior to hearing, the matter was moot. We denied this motion as well.

While Ellensburg Cement Products was implementing the recommendations of its engineer concerning waste water disposal, it did not abandon its appeal of the facts which gave rise to the regulatory directive. While pursuing a course of action on the ground, it preserved its legal right to challenge the facts asserted to constitute a violation of the law. The appropriateness of the regulatory directive was not moot.

IV

"Waters of the State", as defined by RCW 90.48.020 shall be construed to include "lakes, rivers, ponds, streams, inland waters, underground waters, salt waters, and all other surface waters, and water courses, within the jurisdiction of the State of Washington." (Emphasis added.)

We conclude that Ellensburg Cement Products' discharge of wash water was to waters of the state.

V

Ecology's theory in prosecuting the regulatory actions at hearing was that the directive and penalty are supported because appellant's actions constituted a violation of RCW 90.48.080 and RCW 90.48.160.

RCW 90.48.080 states:

> It shall be unlawful for any person to throw, drain, run, or otherwise discharge into any of the waters of this state, or to cause, permit or suffer to be thrown, drained, allowed to seep or otherwise discharged into such waters any organic or inorganic matter that shall cause or tend to cause pollution of such waters according to the determination of the [DOE], as provided in this chapter. (Emphasis added.)

"Pollution" is defined in RCW 90.48.020 to include alteration of waters of the state in such a way as "is likely to create a nuisance or render such wastes harmful" in some way. Thus, the word is described in terms of the detrimental potential of discharges. It is not necessary that harm itself be shown in any case. Lundvall v. DOE, PCHB No. 86-91 (1987).

VI

As to some man-induced alterations to water quality, Ecology has expressed its determination of what constitutes pollution in legislatively-adopted rules setting forth water quality standards. See RCW 90.48.035, Centralia v. Department of Ecology, PCHB No. 84-287 (1985).

The water quality standard for turbidity appears in WAC 173-201-045(2)(vi) which reads:

> Turbidity shall not exceed 5 NTU over background turbidity when the background is 50 NTU or less, or have more than a ten percent increase in aturbidity when the background turbidity is more than 50 NTU.

That exceeding this standard "is likely to create a nuisance or render such waters harmful" is a legislative fact embodied in the agency's rulemaking and not at issue here.

VII

We conclude that the discharges from Ellensburg Cement Products observed On October 6, 1987, violated the relevant water quality standard and, therefore, caused pollution in violation of RCW 90.48.080.

However, even were there no violation of a relevant standard, it would be enough to show that appellants introduced material into public waters which might "tend to cause" this result. Pollution is frequently the result of many discharges from multiple sources, no one being harmful alone, but all combining to produce a harmful consequence. Thus, the regulatory scheme of the water quality statute as a whole is to authorize the limitation of discharges at levels which can be achieved by known, available and reasonable technology. See e.g., RCW 90.48.010, 90.52.040, 90.54.020(3)(b).

What technology can reasonably achieve for a single source is frequently a discharge much cleaner than the level of contamination of public waters which constitutes pollution. It is the ability to control individual discharges at these lower levels of contamination which makes the introduction of new industry possible within the overall standards set for the receiving medium. See Weyerhaeuser v.

Southwest Air Pollution Control Authority, 91 Wn.2d 77, 586 P.2d 1163 (1978).

VIII

The heart of the regulatory apparatus for limiting discharges by use of technology-based requirements, is the waste discharge permit system. RCW 90.48.160 imposes a requirement that

> Any person who conducts a commercial or industrial operation of any type which results in the disposal of solid or liquid waste material into the waters of the state ... shall procure a permit ... before disposing of such waste material... .

Through RCW 90.48.260 and 262, the state permit program incorporates the federal permit requirements for National Pollutant Discharge Elimination System (NPDES). The technology-based limitations are imposed through conditions "necessary to avoid ... pollution" in the permits issued by the state. RCW 90.48.180; See Port Angeles V. DOE, PCHB 84-178 (1985).

IX

Appellant company contends that the discharge of wash water containing cement is not the discharge of wastes and that, therefore, the permit requirement does not apply to it.

The term "waste material" is not defined in the statute. In the absence of statutory definition, the plain meaning is to be used. Webster's New World Dictionary (1968) defines "waste" as "superfluous matter, discarded or excess material, as ashes, garbage, by products."

We conclude that the addition of cement to the wash water constitutes the disposal of "waste material" as that term is used in RCW 90.48.160, and we hold that the discharges from Ellensburg Cement Products observed on October 8, 1987, violated the permit requirement established in RCW 90.48.160.

X

RCW 90.48.120 provides for the issuance of regulatory directives "as appropriate under the circumstances" whenever any person

> Shall violate or creates a substantial potential to violate the provisions of this chapter, or fails to control the polluting content of waste discharged ... .

In light of the violations of RCW 90.48.080 and RCW 90.48.160 involved here, we conclude that the regulatory order (Order DE 87-C411) issued was proper.

XI

RCW 90.48.144 authorizes the issuance of a penalty for the violation of RCW 90.48.080 or RCW 90.48.160 of "up to ten thousand dollars a day for every such violation". The statutory ceiling on this penalty was raised as recently as 1985, reflecting a legislative intention to treat actions contravening the water pollution control statute with increased seriousness. Section 2, Chapter 316, Laws of 1985.

Again in light of the violations of the statute here, we conclude that the imposition of a civil penalty was proper.

XII

This leaves the question of whether the amount of penalty assessed -- $3,000 -- is appropriate. Appellant notes that no harm was shown and that the discharge has been discontinued. Ecology emphasizes the company's prior turbidity problems and its slowness in obtaining the required engineered solution to the problem at hand.

Because of the incidents in 1976 and 1985 (for which it paid penalties), the company knew or should have known that the creation of turbidity in state waters is a violation of water pollution control requirements. Since the prior incidents involved mud and silt, it should have come as no surprise that producing the same effect by adding cement to water would also be considered a violation. Under these circumstances, it is surprising that the installation at the Ellensburg batch plant in 1987 should contain a permanent pad, drain and pipe system for the discharge of cement-laden wastewater directly to the creek.

Under all the facts and circumstances, we conclude that the less-than-maximum penalty imposed was not unreasonable.

XIII

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law, the Board enters this

ORDER

The Department of Ecology's regulatory directive (Order No. DE 87-411) and the Department of Ecology Notice of Penalty Incurred and Due (No. DE 87-C412) assessing a penalty of $3,000 are each AFFIRMED.

DONE this 17th day of January, 1989.

POLLUTION CONTROL HEARINGS BOARD

WICK DUFFORD, Presiding

HAROLD S. ZIMMERMAN, Member